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No.

In The

Supreme Court of the United States

October Term, 1996

GENERAL TRUCK DRIVERS AND HELPERS UNION LOCAL NO. 92, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO,

Petitioner,

vs.

JAMES WILSON,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a labor union may be held liable for breach of its duty of fair representation for allegedly processing a grievance in an arbitrary or perfunctory manner where the grievance is denied in arbitration because it was untimely filed by the aggrieved employee and where the union's conduct therefore could not have affected the outcome of the grievance process.

2. Whether a labor union in a "hybrid 301" action may be held liable both for a proportionate share of the plaintiff's compensatory damages and for the attorney's fees incurred in the plaintiff's pursuit of claims against the employer.

PARTIES TO THE PROCEEDINGS

The correct name of the Petitioner in this case is General Truck Drivers and Helpers Union Local No. 92, affiliated with the International Brotherhood of Teamsters, AFL-CIO; in the proceedings below, the Petitioner was referred to as "Teamsters Local 92," the designation used in the Plaintiffs' complaint. In addition to the parties listed in the caption of this petition, Timothy R. Wadding, Joseph M. Schmitt, Ronald Claybourne, George F. Lyons and Donald O. Kerr were Plaintiffs in the district court and Appellants/Cross-Appellees in the court of appeals. Matlack, Inc. and Casol Leasing Company, Inc. were Defendants in the district court and Appellees/Cross-Appellants in the court of appeals. The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and Teamsters Local 507 were Defendants in the district court but were not parties in the court of appeals.

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit in this case is reported as *Wilson v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America*, 83 F.3d 747 (6th Cir. 1996); this opinion and an order denying the petition for rehearing and suggestion for rehearing en banc, 1996 U.S. App. LEXIS 18572, are reproduced in the appendix hereto. The relevant judgment entry and memorandum opinion of the United States District Court are unpublished and are reproduced in the appendix hereto.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its opinion on May 2, 1996. That court denied the petition for rehearing on July 16, 1996. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 301 of the Labor Management Relations Act of 1947 provides in pertinent part as follows:

> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

> (b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

29 U.S.C. § 185(a), (b).

STATEMENT OF THE CASE

A. Statement of Facts

Respondent James Wilson was employed in Canton, Ohio as a driver by Matlack, Inc. ("Matlack" or "the Company"), which is in the nationwide business of hauling, by tank truck, liquid chemical and petroleum products and dry bulk products. Matlack has for many years been a signatory to a region-wide, multi-employer collective bargaining agreement called the Central States Area Tank Truck Agreement ("the Contract"); its employees in Canton were represented by the Petitioner, General Truck Drivers and Helpers Union Local No. 92, affiliated with the International Brotherhood of Teamsters, AFL-CIO ("Local 92" or "the Union").

In May 1988, Matlack closed its Canton operation, which shipped primarily liquid products, because the Canton terminal had been losing money. Matlack transferred the work remaining in Canton, along with four senior drivers, to Matlack facilities in North Madison and East Liverpool, Ohio; the remaining drivers, including Wilson, were laid off. Under the Contract, laid-off employees maintain recall rights for a period of three years; however, the employer is not required to make more than one offer of employment to a laid-off employee during the three-year period. In June 1988, Matlack offered Wilson employment at its Cincinnati terminal but Wilson did not accept the offer. After his lay-off from Matlack, Wilson obtained employment at another company and, at the time of trial, was earning a higher hourly rate of pay than what he earned at Matlack.

In June 1989, Matlack began operations in Akron, Ohio at a newly constructed, "state-of-the-art" terminal, transporting primarily dry bulk commodities such as plastic pellets. Matlack did not employ its own drivers at Akron but, instead, leased the employees from Casol Leasing, Inc. ("Casol"), a separate corporation engaged in the business of labor leasing. The Akron drivers employed by Casol were represented by Teamsters Local 507 in Cleveland; the terms and conditions of their employment were covered by a collective bargaining agreement between Local 507 and Casol that provided for a lower rate of pay and different pension plan than the Contract to which Local 92 and Matlack were parties. Local 92 did not have a collective bargaining agreement or any bargaining relationship with Casol.

Wilson alleged that he was unaware of the Akron facility until he received an anonymous telephone call on May 18, 1991, informing him of its existence. Wilson visited the Akron terminal, without identifying himself, and was given an

employment application but did not apply for employment there. On May 20, 1991 — three years to the day after the closing of the Canton terminal — Wilson filed with Local 92 a grievance under the Contract claiming that Matlack should have made available to him a job at the Akron terminal.

The day after receipt of Wilson's grievance, Local 92 served the grievance on Matlack and initiated an investigation. Matlack responded that the grievance was untimely and that the Akron facility was operated by Casol under a contract with Local 507. Local 92's business agent informed Wilson that he believed the grievance could not be won because Wilson had turned down Matlack's offer of employment in Cincinnati and because Casol already had a bargaining relationship with Local 507. Nonetheless, the Union continued to investigate and to press the grievance to arbitration under the Contract.

On October 14, 1991, Wilson's grievance was heard by the Ohio/ Kentucky Tank Truck and Dry Bulk Joint State Grievance Committee, the joint labor-management arbitration committee established by the Contract. Under the committee's rules, no representatives of Local 92 or of Matlack sat on the committee that heard Wilson's grievance. At the start of the hearing, Matlack asserted that the grievance was untimely, based on the Contract's requirement that a grievance be filed within 30 days of the date the grievant became, or should have become, aware of the dispute. Both the Union's business agent and its president presented arguments that Wilson's grievance was timely filed based on the knowledge Wilson had at the time and urged the panel to hear the case on its merits. Wilson also stated to the committee his position on the timeliness of his grievance.

The committee returned a decision that the grievance was not filed within 30 days "after the first date upon which the grievant should have been aware of the Akron terminal opening

in December 1988." As a result of the joint arbitration committee's decision that Wilson's grievance was untimely, Local 92 never had the opportunity to present the merits of Wilson's grievance to the committee.

B. Proceedings in the District Court

James Wilson and four other former Matlack drivers filed this "hybrid 301" action in the United States District Court for the Northern District of Ohio on November 20, 1991. Plaintiffs asserted claims against Matlack and Casol, as its alleged alter ego, for breach of contract and against Local 92 for failure to represent them fairly.[1] Only Plaintiff Wilson's claims were taken to the jury; summary judgment was granted against the four other Plaintiffs because of their failure to exhaust the contractual remedies.

At trial in February 1994, Wilson sought as damages only the benefits to which he asserted he would have been entitled under a "30-and-out" pension program offered by a multi-employer pension fund, the Central States, Southeast and Southwest Areas Pension Fund. The jury rendered a verdict in Plaintiff's favor in the amount of $456,000.00 as front pay pension damages, apportioning liability 25% to the Union and 75% jointly and severally to Matlack and Casol.

The district court denied the Defendants' post-trial motions for judgment as a matter of law and ordered a new trial on the issue of damages only, contingent upon the Plaintiff Wilson's refusal to accept a remittitur of the jury verdict to the sum of $133,296.83, representing the present value of the

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1. The Plaintiffs also asserted claims against other Teamster entities; they did not appeal the trial court's dismissal of these claims.

pension benefits. (App. D). Wilson accepted the remitted award, and judgment was entered thereon. (App. C). The court denied Plaintiff's post-trial request for attorney's fees. (App. D).

C. Proceedings in the Court of Appeals

Both the Union and the two employer Defendants appealed the trial court's rulings on liability and damages, arguing *inter alia* that Matlack had not breached the Contract because it had fulfilled its obligations by offering Wilson a position in Cincinnati, that the Union had not breached its duty of fair representation and that any deficiencies in the Union's investigation or processing had not tainted the outcome of the grievance procedure because the joint committee had denied it on timeliness grounds and not heard the Union's presentation on the merits. The Plaintiffs appealed the dismissal of the four Plaintiffs other than Wilson and the trial court's denial of Wilson's request for attorney's fees. The panel of the Sixth Court affirmed the trial court's dismissal of the four Plaintiffs and its award of damages against all three Defendants but reversed the denial of attorney's fees, holding that the fees incurred in asserting claims against Matlack and Casol were an element of damages as against the Union. (App. B).

Local 92 filed a petition for rehearing in the court of appeals with a suggestion for rehearing en banc. The request for rehearing en banc was denied, and the request for rehearing was referred to the original panel. The panel denied the petition for rehearing but issued an order briefly discussing the Union's duty of fair representation, an issue not addressed in the original decision. (App. A).

REASONS FOR GRANTING THE WRIT

I.

THE SIXTH CIRCUIT DEPARTED FROM ESTABLISHED PRECEDENT BY HOLDING THE UNION LIABLE FOR BREACH OF ITS DUTY OF FAIR REPRESENTATION FOR ALLEGEDLY PROCESSING A GRIEVANCE IN AN ARBITRARY OR PERFUNCTORY MANNER WHERE THE GRIEVANCE WAS DENIED IN ARBITRATION BECAUSE IT WAS UNTIMELY FILED BY THE AGGRIEVED EMPLOYEE, AS THE UNION'S CONDUCT SIMPLY COULD NOT HAVE AFFECTED THE OUTCOME OF THE GRIEVANCE PROCESS.

This case is a "hybrid 301" action, brought by an individual employee under Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185, which vests in the federal district courts jurisdiction over "[s]uits for violation of contracts between an employer and a labor organization." In a hybrid 301 action, an employee may file suit individually for breach of a collective bargaining agreement between the employee's union and the employer. To prevail, the plaintiff employee must prove both that the employer's action violated the terms of the collective bargaining agreement and that the union breached its duty of fair representation of the employee with regard to the matter. *Vaca v. Sipes*, 386 U.S. 171, 186 (1967); *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 570-71 (1976).

Where the union has processed the employee's grievance through the full contractual procedures, the plaintiff must show that the union's breach of its duty of fair representation "seriously undermined the integrity of the arbitration process."

Hines, 424 U.S. at 567; *see also Black v. Ryder/P.I.E. Nationwide, Inc.*, 15 F.3d 573, 585 (6th Cir. 1994); *Thomas v. United Parcel Serv., Inc.*, 890 F.2d 909, 915 (7th Cir. 1989); *Landry v. The Cooper/T. Smith Stevedoring Co.*, 880 F.2d 846, 852 (5th Cir. 1989); *Thomas v. Bakery Workers Union Local No. 433*, 826 F.2d 755, 758 (8th Cir. 1987), *cert. denied*, 484 U.S. 1062 (1988); *Singer v. Flying Tiger Line, Inc.*, 652 F.2d 1349, 1355 (9th Cir. 1981); *DeBoles v. Trans World Airlines, Inc.*, 552 F.2d 1005, 1018 (3d Cir.), *cert. denied*, 434 U.S. 837 (1977); *Hardee v. North Carolina Allstate Servs., Inc.*, 537 F.2d 1255, 1258 (4th Cir. 1976).

This rule was intended to balance the policies favoring the finality of labor arbitrations, *see, e.g.*, 29 U.S.C. § 173(d), with protection for discharged employees who otherwise "would be left without jobs and without a fair opportunity to secure an adequate remedy." *Hines*, 424 U.S. at 571. Where the process has not "fundamentally malfunctioned" or been tainted because of the misconduct of the union, the employer should be protected from relitigation of a dispute that has been settled by final and binding arbitration under the collective bargaining agreement. *See id.* at 567-69.

In this case, however, the Sixth Circuit seems to have abandoned this rule, at least in the case where the grievance at issue was decided in arbitration because of a procedural defect attributable to the grievant himself. The effect of the court's ruling is to hold Local 92 liable for damages despite manifest evidence that any breach of its duty of fair representation could not have "contributed to the erroneous outcome of the contractual proceedings." *Hines*, 424 U.S. at 567. The Union maintains that it adequately investigated, processed and presented Wilson's grievance and, as a matter of law, did not breach its duty of fair representation. Nevertheless, even accepting the jury's finding on this issue, it is clear that any

breach of the Union's duty could not have affected the outcome of the grievance procedure, a necessary element of a hybrid 301 claim. Accordingly, the Union respectfully urges that the Court grant its petition to review the decision of the Sixth Circuit at least insofar as it held the Union liable for damages despite uncontroverted evidence that any breach by the Union did not taint the grievance proceeding, in derogation of the rulings of this Court and of nearly all the Circuit courts.

The jury here found that Local 92 violated its duty to represent Wilson fairly by handling his grievance in a perfunctory manner.[2] Neither the trial court, in a decision refusing to set aside the jury verdict, nor the Sixth Circuit panel decision addressed the sufficiency of the evidence on this point. The appellate panel's order denying rehearing referred briefly to evidence that Local 92 did not sufficiently investigate the Canton operation and the Matlack/Casol relationship after Wilson filed his grievance and that its business agent expressed the opinion that the grievance would be unsuccessful. App. A at 2a-3a. However, all of this conduct occurred *after* Wilson filed the grievance. It was undisputed that the joint arbitration committee denied Wilson's grievance on the basis of his own untimely filing. Any alleged flaws in the Union's investigation or processing of the grievance could not have affected the outcome, since the Union was not permitted to present its case on the merits of the grievance and the results of its investigation were never heard.

The supplemental order of the Sixth Circuit devoted just two sentences to discussion of the evidence of the Union's

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2. A union may be found to breach its duty of fair representation to a member in the grievance process if its actions are "arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). Specifically, a union "may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion." *Id.* at 191.

alleged breach of duty as it related to the timeliness of Wilson's grievance. App. A at 3a-4a. Its perfunctory and post hoc conclusion that the Union's conduct at the hearing likely would have brought about a different decision by the committee on timeliness is utterly unsupported by the evidence, including Wilson's own testimony.[3] It is manifestly clear that any allegedly arbitrary or perfunctory conduct by Local 92 did not "taint" the grievance procedure and that the judgment against Local 92 is in contravention of the case law and should not stand.

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3. Both Wilson and the Local 92 business agent testified that the arguments on the timeliness issue at the committee hearing lasted 15 to 20 minutes. (Albright Tr. 1400-01; Wilson Tr. 882, 1022). The Union agent testified that he "argued the point under timeliness that Mr. Wilson was aware of that terminal around May 18th or 19th." (Albright Tr. 1400). Wilson himself testified that the Union representative "said that it wasn't untimely and that the grievance should be heard. And then they argued a little bit." (Wilson Tr. 880). While the record does not indicate exactly what was said at the committee hearing, it is clear that the Union representatives argued that Wilson's grievance was timely based on Wilson's actual knowledge of the alleged contract violation. The panel's supplemental order apparently posits that the Union should have presented an argument that Wilson did not have *constructive* knowledge of the violation. However, a union representative's alleged failure to make nice legal distinctions in arguments on a limitations issue does not constitute unfair representation. "[I]t is unreasonable to expect union officials to meet the same standards expected of an attorney in a court of law." *Thomas v. United Parcel Serv.*, 890 F.2d 909, 920 (7th Cir. 1989).

II.

THIS COURT SHOULD RESOLVE THE UNCERTAINTY AND DIVISION AMONG THE LOWER COURTS AS TO THE ALLOCATION OF DAMAGES AND THE AVAILABILITY OF ATTORNEY'S FEES IN HYBRID 301 CASES.

This Court has not addressed definitively the significant issues of the apportionment of damages and the availability of attorney's fees in an action by an employee against his employer and his union, issues on which there is substantial division among the lower courts. The Court should grant certiorari in this case to resolve these matters conclusively and provide direction to the lower courts.

Although the hybrid 301 cause of action has been recognized for some 30 years, *see Vaca*, 386 U.S. at 184-88, this Court has never ruled conclusively on the appropriate method of apportioning damages as between the employer and the union and, specifically, on the availability of attorney's fees in such a case. In the seminal *Vaca* case, the Court concluded that a labor union could be sued for breach of its duty to represent employees fairly and that the union could be assessed the increase in the employee's damages caused by the union's breach. *Id.* at 197-98. However, the Court noted that a union could not be held liable for damages attributable solely to the employer's breach of contract, holding that the labor laws were not intended to "shield employers from the natural consequences of their breaches of bargaining agreements by wrongful conduct in the enforcement of such agreements." *Id.* at 186.

Applying these principles, *Vaca* held that:

> damages attributable solely to the employer's breach of contract should not be charged to the union, but increases if any in those damages caused by the union's refusal to process the grievance should not be charged to the employer. In this case, even if the Union had breached its duty, all or almost all of [the plaintiff's] damages would still be attributable to his wrongful discharge by [the employer].

386 U.S. at 197-98. Accordingly, the Court in *Vaca* overturned an award of compensatory and punitive damages assessed solely against the union, with the employer not a party to the case.

The *Vaca* Court explained that "[t]he governing principle, then, is to apportion liability between the employer and the union according to the damage caused by the fault of each." *Id.* at 197. However, the question of exactly how the courts should "apportion liability" remains unsettled.

Three years after *Vaca*, this Court decided the case of *Czosek v. O'Mara*, 397 U.S. 25 (1970). There, the Court stated:

> Assuming a wrongful discharge by the employer independent of any discriminatory conduct by the union and a subsequent discriminatory refusal by the union to process grievances based on the discharge, damages against the union for loss of employment are unrecoverable except to the extent that its refusal to handle the grievances added to the difficulty and expense of collecting from the employer.

397 U.S. at 29.

After *Vaca* and *Czosek*, it was generally assumed that, in a hybrid section 301 case, a union was responsible only for the incremental damages incurred by the plaintiff beyond lost pay and benefits — that is, for litigation expenses. *See, e.g., Seymour v. Olin Corp.*, 666 F.2d 202, 213-14 (5th Cir. 1982) (holding that attorney's fees and costs are "a fair measure of the 'difficulty and expense of collecting' " from the employer); *Milstead v. International Brotherhood of Teamsters*, 649 F.2d 395 (6th Cir. 1981); *Segarra v. Sea-Land Serv., Inc.*, 581 F.2d 291, 298 (1st Cir. 1978); *Richardson v. Communications Workers of America*, 443 F.2d 974 (8th Cir. 1971).

The Sixth Circuit stated the rule that, in a hybrid 301 case as against the union, "the principal element of [plaintiff's] damages is the amount which it cost him in attorney fees and other expenses to do that which the union was obliged but failed to do on his behalf." *Scott v. Teamsters Local 377*, 548 F.2d 1244, 1246 (6th Cir.), *cert. denied*, 431 U.S. 968 (1977). Similarly, the Ninth Circuit ruled that, where a union wrongfully has failed to process a grievance to arbitration, the employee's expense in obtaining legal representation to pursue his claim against the employer "is not merely a result of the harm that [the union] did him; it is the harm itself." *Dutrisac v. Caterpillar Tractor Co.*, 749 F.2d 1270, 1275 (9th Cir. 1983). Some courts have gone so far as to award attorney's fees against a union for a breach of the duty that requires the employee to retain counsel to pursue a claim against his employer, even where the employer is found not to have violated the contract and the litigation is unsuccessful. *See, e.g., id.; Self v. Teamsters Local 61*, 620 F.2d 439 (4th Cir. 1980).

However, in *Bowen v. United States Postal Service*, 459 U.S. 212 (1983), the Court in a 5-4 vote held that the union could be responsible for a portion of the plaintiff's lost compensation, rejecting the union's argument that it should be

liable only for the plaintiff's litigation costs. The majority in *Bowen* acknowledged that:

> the employer discharged the employee wrongfully and remains liable for the employee's backpay. The union's breach of its duty of fair representation, however, caused the grievance procedure to malfunction resulting in an increase in the employee's damages. . . . [T]he union is responsible for the increase in damages and, as between the two wrongdoers, should bear its portion of the damages.

459 U.S. at 223 (internal citation omitted).

Again, though, the Court provided little specific guidance as to how the damages should be allocated or how the "increase in damages" caused by the union's conduct should be measured. The district court in *Bowen* had permitted the jury to use its discretion in apportioning damages but had suggested it would be permissible to hold the employer liable for backpay prior to a "hypothetical arbitration decision" date — the date on which the employee would have been reinstated through the grievance and arbitration process but for the union's refusal to arbitrate his grievance — and to hold the union liable for damages thereafter.[4] 459 U.S. at 215. As the strong dissent in

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4. In *Bowen* the union was found to have arbitrarily refused to process the plaintiff's meritorious grievance to arbitration. It is unclear whether *Bowen's* rule that a union should be liable for compensatory damages ought to be extended to the case where, as here, the union has processed the employee's grievance to a final and binding determination under the contractual procedures but where a court has later found that the union's conduct in presenting it was in some way improper under *Vaca*. The cases awarding attorney's fees against a union almost uniformly involve the (Cont'd)

Bowen[5] pointed out, however, this method of apportionment would result (and did, in that case) in a damages award in which "the union will be subject to large liability, far greater than that of the employer, the extent of which will not be in any way related to the union's comparative culpability." *Id.* at 238 (White, J., dissenting in part). The "relatively impotent union" would be liable for the great bulk of damages only because it failed to rectify the wrongful actions of the employer, the primary wrongdoer. *Id.* at 239.

The lower courts have interpreted the apportionment requirement of *Bowen* in a number of different, and often inconsistent, ways. Because the union defendant in *Bowen* challenged its liability for any lost compensation at all, but did not test the validity of the specific apportionment of damages, this Court specifically declined to address the propriety of the method of apportionment used by the trial court. *Id.* at 230 n.19. Nonetheless, some courts have read *Bowen* as approving or even requiring use of the "hypothetical arbitration date" method of allocating damages. *See, e.g., Caputo v. National Ass'n of Letter Carriers*, 730 F. Supp. 1221, 1236 (E.D.N.Y. 1990); *Colon Velez v. Puerto Rico Marine Mgmt., Inc.*, 693 F.

(Cont'd)
union's failure to process or arbitrate the employee's grievance, rather than an alleged failure to provide adequate presentation of the grievance in arbitration, as here. The reasoning in such cases is that, "[w]hen there is a legal duty to provide representation, whether that duty arises out of a contractual undertaking or, as here, by operation of law, if the representation is wrongfully withheld, the cost of substitute representation should be recoverable damages." *Ames v. Westinghouse Elec. Corp.*, 864 F.2d 289, 293 (3d Cir. 1988), *quoted in Bennett v. Local Union No. 66*, 958 F.2d 1429, 1440 (7th Cir. 1992). This logic would not seem to apply where, as in this case, the union *did* provide representation that is later deemed inadequate.

5. This dissent was joined by now-Chief Justice Rehnquist.

Supp. 1335, 1344 (D.P.R. 1988), *aff'd on other grounds*, 957 F.2d 933 (1st Cir. 1992); *Powell v. Kovacs, Inc.*, 596 F. Supp. 1520 (W.D. Mo. 1984); *see also San Francisco Web Pressmen & Platemakers' Union v. NLRB*, 794 F.2d 420, 424 (9th Cir. 1986) (affirming unfair labor practice remedy ordered by National Labor Relations Board).[6]

Recently, the Tenth Circuit broke from this line of cases and upheld a district court's rejection of the hypothetical arbitration date method in favor of a "percentage-of-fault" analysis. *Aguinaga v. United Food & Commercial Workers Int'l Union*, 993 F.2d 1463 (10th Cir. 1993), *aff'g*, 720 F. Supp. 862 (D. Kan. 1989), *cert. denied*, 114 S. Ct. 880 (1994). The Tenth Circuit held:

> Apportioning damages based on proportionate fault, by definition, necessarily serves *Vaca's* overriding purpose of apportioning "according to the damage caused by the fault of each." Here, by using a proportionate fault method as opposed to the hypothetical arbitration date method, the [trial] court was able to apportion the majority of the damages to the primary wrongdoer, [the employer].

993 F.2d at 1476 (internal citation omitted).

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6. By contrast, the Ninth Circuit in at least one case has continued to follow pre-*Bowen* authority, accepting the parties' stipulation that the employer was solely liable for the employee's lost pay and upholding the assessment of attorney's fees as damages against the union. The Court reasoned in accordance with the earlier cases that the amount the plaintiff was "forced to expend in attorney fees to do that which the union was obligated but failed to do" was the "principal element[ ] of damages" as against the union. *Zuniga v. United Can Co.*, 812 F.2d 443, 455 (9th Cir. 1987).

The *Aguinaga* court "read *Bowen* to simply hold that in order to make an employee whole, a union can be held liable for backpay to the extent that the union caused the employee to suffer the lost wages." 993 F.2d at 1475. The comparative fault formula, the court held, serves the *Vaca* and *Bowen* principles that damages in a hybrid 301 case must be apportioned according to each defendant's fault, that the union should be held responsible for increases in the employee's damages that it caused and that the employee must be made whole. *Id.* at 1476.

Another post-*Bowen* method of apportioning damages based on each defendant's fault was applied by the district court in *Byrne v. Buffalo Creek R.R.*, 123 L.R.R.M. (BNA) 2431 (W.D.N.Y. 1985). In that case, the district court noted that strict use of the hypothetical arbitration date would lead to inequitable results that could not have been intended by the *Bowen* Court. The court attempted to reconcile the competing policies noted in *Bowen*, determining that the most appropriate method of allocating damages is "to tie the apportionment to the facts of a particular case." 123 L.R.R.M at 2436 n.3. The *Byrne* court made a very fact-specific determination of damages, holding the employer solely responsible for all back pay for the period before "the onset of the union's responsibility," as well as for a later period during which the union actively processed the plaintiff's grievance. The court calculated the ratio of these two periods combined to the total back pay period and held the employer solely responsible for the same percentage of the employee's total damages. The court then assessed the remaining damages equally against the employer and the union.

Other cases have held that, where an employer and a union collude or participate in each other's breach, they should be jointly and severally liable for both compensatory damages and attorney's fees. *See, e.g., Bennett v. Local Union No. 66*, 958 F.2d 1429 (7th Cir. 1992); *Allen v. Allied Plant Maintenance Co.*, 881 F.2d 291 (6th Cir. 1989); *cf. Freeman v. O'Neal Steel,*

Inc., 436 F. Supp. 607 (D. Ala. 1977) (pre-*Bowen* case awarding damages against employer and union jointly and severally where both "equally culpable"), *rev'd on other grounds*, 609 F.2d 1123 (5th Cir.), *cert. denied*, 449 U.S. 833 (1980).

In the present case, the district court held that the comparative fault method of *Aguinaga* was the appropriate way to apportion damages. The Sixth Circuit affirmed this means of allocating damages without discussion, implicitly joining the Tenth Circuit and declining to follow *Colon Velez* and the other cases using the hypothetical arbitration date method.

Clearly, there is a split of authority among the lower courts regarding the appropriate method for apportioning damages in a hybrid 301 case after *Bowen*. Furthermore, *Bowen* did not discuss the availability *vel non* of attorney's fees in a hybrid 301 case, leaving questions about the validity of pre-*Bowen* precedents awarding fees as an element of damages against a union and creating division among the lower courts as to whether a plaintiff may be awarded attorney's fees and under what circumstances.

The Tenth Circuit in a second decision in *Aguinaga* reversed the district court's award of attorney's fees to the plaintiff. *Aguinaga v. United Food & Commercial Workers Int'l Union*, 993 F.2d 1480 (10th Cir. 1993) (*Aguinaga II*). The court implicitly held that attorney's fees would not be awarded against the union where the union was held liable for a proportionate share of the plaintiff's damages. Although the opinion mentioned in a footnote that "attorney fees are available, if sought, as compensatory damages in § 301 cases," 993 F.2d at 1483 n.2, the court proceeded to analyze the attorney's fees issue by application of the American Rule, determining that an award of fees was inappropriate. 993 F.2d

at 1464, 1481 (citing *Alyeska Pipeline Services Co. v. Wilderness Society*, 421 U.S. 240 (1975)). Similarly, the Second Circuit accepted without discussion a jury's apportionment of fault between a union and an employer and considered the issue of attorney's fees under the American Rule only. *Cruz v. Local Union No. 3*, 34 F.3d 1148 (2d Cir. 1994). On the other hand, in *Byrne* the district court included attorney's fees and costs in the employee's total damages to be apportioned between the union and the employer, without discussion of the rationale for awarding fees. *Byrne*, 123 L.R.R.M. at 2437.

The Sixth Circuit in this case has taken yet another position, holding Local 92 liable both for a share of compensatory damages and for the attorney's fees and costs incurred in pursuing the Plaintiff's claims against the employer and its alleged alter ego. The district court applied the percentage-of-fault analysis under *Aguinaga* and assessed 25 percent of the Plaintiff's damages against the Union, based on the jury's evaluation of the parties' relative fault. The trial court held that attorney's fees were not recoverable, as there was no applicable exception to the general American Rule that "a prevailing litigant is ordinarily not entitled to collect a reasonable attorney's fee from the loser." App. D at 43a-49a (citing *Alyeska*, 421 U.S. at 247; *Summit Valley Indus., Inc. v. Local 112*, 456 U.S. 717 (1986)).

The Sixth Circuit implicitly upheld the use of the comparative fault analysis in this case but, relying primarily on Circuit precedent decided before *Bowen*, reversed the trial court's ruling on attorney's fees and held that the Plaintiff was entitled to recover from the Union his reasonable attorney's fees incurred in pursuing his claims against the Defendant employers.[7] App. B at 12a-15a. The court held that its pre-

7. The Sixth Circuit decision requires the Union to pay Wilson's fees expended in his claims against both Matlack and Casol. The theoretical basis (Cont'd)

Bowen decision in *Scott* was still viable and that the attorneys' fees Wilson incurred in pursuing the claim for breach of the collective bargaining agreement constituted "the measure of damages which can be awarded to a prevailing plaintiff in a suit for a breach of a union's duty of fair representation in an action under [Section] 301." App. B at 13a (quoting *Scott*, 548 F.2d at 1246) (brackets in original). *See also Dushaw v. Roadway Express, Inc.*, 816 F. Supp. 1229 (N.D. Ohio 1992) (apportioning both damages and attorney's fees on a percentage-of-fault basis but basing award of fees on "bad faith" exception to American Rule), *rev'd on other grounds*, 66 F.3d 129 (6th Cir. 1995), *cert. denied*, 116 S. Ct. 1353 (1996).[8]

Local 92 submits that, at least where there is no question of collusion between the defendants, the most rational and appropriate rule is that the plaintiff's damages in a hybrid 301 case should be apportioned based on comparative fault and that attorney's fees are not awardable. Such a rule takes into account

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(Cont'd)
for the recovery of fees against a union is the union's failure to properly pursue the contractual grievance procedures to obtain relief for the employee. However, in this case, Local 92 had no contract with Casol, and the Union could not have filed a grievance against Casol or obtained any relief for Wilson against Casol under the contractual processes. Accordingly, the Union should not have been required to pay Wilson's fees incurred in pursuing his claim against Casol.

8. In *Dushaw*, the trial court awarded attorney's fees and costs of more than $165,000, although compensatory damages, even with pre-judgment interest, were less than $127,000. The Sixth Circuit reversed the trial court's decision on liability, with the concurring judge noting that, in any event, the trial court's award of "exorbitant" fees would not have been permitted to stand. 66 F.3d at 133 (Wellford, J., concurring). Nonetheless, this case illustrates the potential unfairness of a rule that arbitrarily apportions liability to the union for litigation expenses and to the employer for compensatory damages, particularly where the compensatory damages are relatively small.

the underlying principles of *Vaca* and *Bowen* regarding the apportionment of damages according to fault, protects the collective interests of union members in preserving limited funds and provides appropriate safeguards and incentives for both employers and unions to fulfill their obligations to employees. As the Tenth Circuit noted in *Aguinaga*, a proportionate damages rule allows the factfinder to identify the primary wrongdoer, to assess each defendant's relative culpability and to apportion damages more rationally than by the application of a hypothetical arbitration date or other arbitrary formula.

An enforcement scheme in which a union is liable for a proportionate share of the employee's actual damages but not for attorney's fees would still provide sufficient "incentive for the Union to process its members' claims where warranted," *Bowen*, 459 U.S. at 227, and for it to fairly and adequately present those claims. Where the union is potentially liable for compensatory damages, there is no need to provide further incentive in the form of liability for attorney's fees. Certainly, there is no reason why a union requires a greater incentive to meet its duty of fair representation than the employer — which almost invariably has much greater assets than a local union — needs to comply with its contractual obligations in the first instance. *Cf. Seymour v. Olin Corp.*, 666 F.2d 202, 215 (5th Cir. 1982) (holding that liability for attorney's fees and costs provides "appropriate incentive" for unions to respect their duty of fair representation, without additional potential liability for other damages).

Furthermore, such a rule would be consistent with the policy concerns noted by this Court in a different context in *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42 (1979), in which the Court held that punitive damages were not recoverable for breach of a union's duty of fair

representation. "This limitation on union liability thus reflects an attempt to afford individual employees redress for injuries caused by union misconduct without compromising the collective interests of union members in protecting limited funds." 442 U.S. at 50; *see also Vaca*, 396 U.S. at 197. Finally, where the union is held liable under *Bowen* for a portion of the plaintiff's lost wages and other compensatory damages, attorney's fees are no longer the "principal element of damages" as against the union, and there is no reasoned basis for departing from the American Rule.

For the foregoing reasons, the Petitioner respectfully urges this Court to grant certiorari in this case to resolve the conflicting authority and provide guidance to the lower courts regarding the appropriate allocation and measure of damages in hybrid 301 actions.

CONCLUSION

For the foregoing reasons, Petitioner, General Truck Drivers and Helpers Union Local No. 92, respectfully prays that this Court grant its application for a writ of certiorari.

Respectfully submitted,

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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED JULY 16, 1996

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 94-3837, 94-3856, 94-3861, 94-3863

JAMES WILSON; TIMOTHY R. WADDING; JOSEPH M. SCHMITT; RONALD CLAYBOURNE; GEORGE F. LYONS; and DONALD O. KERR,

Plaintiffs-Appellants, Cross-Appellees,

v.

THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFERS, WAREHOUSEMEN, and HELPERS of AMERICA, AFL-CIO; TEAMSTERS LOCAL 507; TEAMSTERS LOCAL 92; MATLACK, INC.; and CASOL LEASING, INC.,

Defendants-Appellees, Cross-Appellants.

BEFORE: KEITH, MARTIN, and NELSON, Circuit Judges.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

Appendix A

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied, with the following comments.

Following a jury trial, the parties appealed to this Court claiming that numerous and extensive errors occurred below. In attempting to ferret out the issues on appeal worthy of discussion, we originally determined that union defendant Local 92's claim that the evidence was insufficient as a matter of law to sustain a finding that it breached its duty of fair representation did not merit comment. Local 92's petition for rehearing prompts this discussion.

To prevail on a hybrid Section 301 claim, a plaintiff must prove that the employer breached the collective bargaining agreement and that the union breached its duty of fair representation. *Bagsby v. Lewis Bros. Inc.*, 820 F.2d 799, 801 (6th Cir. 1987). A union breaches its duty of fair representation to a member if it handles a grievance arbitrarily, discriminatorily, or in bad faith. *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). Although negligent behavior alone does not constitute a breach of the duty of fair representation, *United Steelworkers of America v. Rawson*, 495 U.S. 362, 372-73 (1990), "a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion." *Vaca*, 386 U.S. at 191.

Sufficient evidence was introduced at trial to allow the jury to conclude that the union processed Wilson's grievance in a perfunctory manner. Wilson's grievance claimed that Matlack was in fact operating the terminal in Akron, Ohio. Union

representative Russell Albright testified on cross-examination that he was aware that Casol Leasing, on at least one occasion, had been associated with Matlack at another terminal. Yet when told by Matlack representative Jack Ketchum that Akron was a Casol Leasing operation, Albright did not immediately respond. Akron, Ohio is twenty miles from Canton. Albright did not visit the Akron terminal, nor did he call the terminal, to investigate Wilson's claim that Matlack trucks were operating out of the Akron terminal, and that the Akron terminal's phone was answered "Matlack." Wilson testified that Albright told him that filing a grievance wouldn't do any good, and that there was nothing Wilson could do about the Akron terminal. Of course, Local 92 introduced evidence at trial that it did in fact handle Wilson's grievance adequately. However, we believe the evidence sufficient to sustain the jury's finding that Local 92 handled his grievance in a perfunctory manner.

Local 92's breach of its duty of fair representation must also have affected the outcome of the arbitration award. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 567-68 (1976). In this case, the joint arbitration committee concluded that Wilson's grievance was untimely filed, and did not address the merits of his claim. Pursuant to collective bargaining agreement, grievances must be filed within thirty days after the grievant should have been aware of the existence of the facts supporting such a grievance. Although Local 92 argues to the contrary, we believe sufficient evidence was introduced that the union's breach of its duty of fair representation affected the outcome of Wilson's grievance before the joint arbitration committee. Although the jury had little evidence to consider on this issue, Ketchum testified that, after his point of order that Wilson's grievance was untimely, neither party presented any evidence on the issue. Albright's testimony regarding the

hearing before the arbitration committee reveals that he did not assert that Wilson could not have become aware that he had a grievance because the Akron facility ostensibly was being operated by Casol Leasing at the time. We believe this to be sufficient evidence to allow the jury to conclude that, adequate performance of Local 92's duty of fair representation "probably would have brought about a different decision." *Black v. Ryder/ P.I.E. Nationwide, Inc.*, 15 F.3d 573, 585 (6th Cir. 1994). Accordingly, we deny the petition for rehearing.

It is so ordered.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green, Clerk

APPENDIX B — DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DATED MAY 2, 1996

Nos. 94-3837/3856/3861/3863

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES WILSON; TIMOTHY R. WADDING; JOSEPH M. SCHMITT; RONALD CLAYBOURNE; GEORGE F. LYONS; and DONALD O. KERR,

Plaintiffs-Appellants (94-3837), Cross-Appellees,

v.

THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO; TEAMSTERS LOCAL 507,

Defendants,

TEAMSTERS LOCAL 92 (94-3863); MATLACK, INC. (94-3856); and CASOL LEASING, INC. (94-3861),

Defendants-Appellees, Cross-Appellants.

On APPEAL from the United States District Court for the Northern District of Ohio

Decided and Filed May 2, 1996

Appendix B

Before: KEITH MARTIN, and NELSON, Circuit Judges.

BOYCE F. MARTIN, JR., Circuit Judge. Plaintiffs, all of whom are former employees of defendant Matlack, Inc., filed suit on November 18, 1991, against the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; Local 507 of the International Brotherhood of Teamsters; Local 92 of the International Brotherhood of Teamsters; Matlack, Inc.; and Casol Leasing, Inc., alleging that Matlack breached its collective bargaining agreement with Local 92 and that Local 92 breached its duty of fair representation to the plaintiffs. Prior to trial, the district court dismissed plaintiffs Wadding, Schmitt, Claybourne, Lyons, and Kerr, leaving only James Wilson as the remaining party. Among other things, plaintiffs appeal this dismissal. The district court also dismissed Local 507 and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, leaving Matlack, Casol Leasing, and Local 92 as the remaining defendant parties. This dismissal has not been appealed.

Wilson's claim, commonly called a "hybrid" action alleging an employer's breach of a collective bargaining agreement and a union's breach of its duty of fair representation under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, was heard in a seven-day jury trial commencing on February 14, 1994. On April 8, 1994, the jury returned a verdict in favor of Wilson, and awarded $456,000.00 in lost pension benefits as damages. The parties filed various post-trial motions seeking judgment as a matter of law, a new trial, and/or an altered judgment. On July 1, the district court ordered a new trialcontingent upon Wilson's acceptance or rejection of

its remitted damages award in the amount of $133,296.83, the discounted present value of Wilson's lost pension benefits. On July 8, Wilson accepted the remittitur, and the district court entered a final judgment on July 13.

Wilson, along with the other five previously dismissed plaintiffs, filed a timely appeal to this Court, asserting several errors, chief among them the district court's dismissal of Wadding, Schmitt, Claybourne, Lyons, and Kerr on the ground that these individuals had failed to invoke or exhaust available grievance and arbitration remedies prior to filing suit in federal court. Each of the defendants cross-appealed, claiming that the district court committed numerous errors. After an extensive review of the record, we AFFIRM the judgment entered on the jury's verdict on the issue of liability, REVERSE the district court's judgment as to the award of attorneys' fees, and REMAND for further proceedings.

I.

Matlack is a nationwide trucking company engaged in hauling both dry and liquid bulk products. Matlack has been party for several years to a multi-employer collective bargaining agreement with the Central Conference of Teamsters, covering some thirteen Midwestern states, including Ohio. Defendant Local 92 served as the collective bargaining representative for Matlack's Canton, Ohio terminal employees. Wilson and the five dismissed plaintiffs were Matlack employee truck drivers based out of the Canton terminal. On May 20, 1988, Matlack closed its Canton terminal and laid off its Canton drivers, claiming poor business as the reason for closure.

Appendix B

Pursuant to the collective bargaining agreement between Local 92 and Matlack, Matlack is required to make available to laid off employees any positions that open up within three years of the closing of a facility. Section 5.5(c) of the agreement states that:

> When a branch, terminal, division, or operation is closed and the work of the branch, terminal, division or operation is eliminated, employees who are laid-off thereby shall be given first opportunity for available regular employment at any other branch, terminal, division, or operation of the Employer within the Area of the Supplemental Agreement under which employed. The obligation to offer such employment shall continue for a period of three (3) years from the date of closing. However, the Employer shall not be required to make more than one offer during this period. Any employee accepting such offer shall pay his own moving expenses. If hired, he shall go to the bottom of the seniority board but shall have company seniority for fringe benefits only.

After closing the Canton terminal, Matlack offered Wilson a position at Matlack's Cincinnati terminal. Wilson did not accept the offer.

In June of 1989, Matlack opened a new "intermodal" truck terminal in Akron, Ohio, in conjunction with defendant Casol Leasing. Casol Leasing's corporate responsibility was to hire the drivers working out of the new Akron terminal. Although

Casol's sole function is to provide employees to Matlack, Casol Leasing and Matlack are separate corporate entities. Matlack did not offer Wilson a position at the new Akron facility and Wilson claims that he was completely unaware of the existence of a Matlack trucking terminal at Akron until he received an anonymous phone call informing him of that fact on May 18, 1991. After driving to Akron to determine whether Matlack in fact was operating out of Akron, Wilson filed grievances with Local 92 on May 20. Wilson's grievances ultimately were dismissed as untimely in 1991 by the Joint State Committee in Ohio, the arbitration committee in charge of handling disputes under the collective bargaining agreement.

Finally, on November 18, 1991, Wilson, along with the other five former Matlack employees, filed this complaint in district court pursuant to Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a), alleging that Local 92 breached its duty of fair representation in its handling of Wilson's grievances, and that Matlack breached the collective bargaining agreement governing the relations between the parties. Also named in the complaint was Casol Leasing. The plaintiffs claimed that Casol Leasing was Matlack's "alter ego" and therefore liable under the collective bargaining agreement. On June 14, 1993, the district court granted summary judgment in favor of defendants Local 507 and the International Brotherhood of Teamsters, dismissing them from the case. As noted above, the parties have not appealed this ruling.

II.

A.

The plaintiffs appeal several issues, three of which merit discussion. Plaintiffs first argue that the district court erred by

erred by awarding summary judgment in favor of the defendants and dismissing Wadding, Schmitt, Claybourne, Lyons, and Kerr as improper parties to the lawsuit. The district court dismissed these plaintiffs on the ground that each had failed to exhaust his administrative remedies before seeking relief in federal court.

We review the district court's award of summary judgment *de novo. Sims v. Memphis Processors, Inc.*, 926 F.2d 524, 526 (6th Cir. 1991). Summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In determining whether summary judgment is proper, we view the facts and any reasonable inferences drawn from those facts in a light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). However, the mere existence of a colorable factual dispute does not preclude an award of summary judgment. There must be a genuine dispute between the parties on an issue of material fact in order to preclude summary judgment. *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 247-48 (1986) (citations omitted).

Plaintiffs do not dispute that a party must exhaust contractual grievance remedies before seeking relief in federal court. *See Clayton v. International Union*, 451 U.S. 679, 681 (1981); *Durham v. Mason and Dixon Lines*, 404 F.2d 864, 865 (6th Cir. 1968), *cert. denied*, 394 U.S. 998 (1969). Instead, they claim that: 1) plaintiff Wilson's grievance was a group grievance, filed on behalf of all six plaintiffs, and that they therefore have in fact exhausted their contractual grievance procedures; or, in the alternative, 2) they were excused from the exhaustion requirement because it would have been futile for them to pursue the contractual remedies available under the

collective bargaining agreement. Neither of these arguments wins the day.

Here, the collective bargaining agreement did not address the issue of whether a union member may file a grievance on behalf of other union members. Accordingly, the district court considered evidence extrinsic to the actual agreement to determine whether group filing of grievances was proper under the agreement. *See Scott v. Anchor Motor Freight, Inc.*, 496 F.2d 276, 280 (6th Cir.), *cert. denied*, 419 U.S. 868 (1974). The evidence submitted by the parties tended to show that group grievances had been allowed in the past, but only where the grievance was filed by a union steward, or where all members of the group personally signed the grievance. In light of this, the district court found that, although group grievances may have been filed under the agreement in some situations, the grievance filed by Wilson did not qualify as a group grievance. After a careful review of the facts, particularly those relied upon by the plaintiffs, we must agree with the district court. Most persuasive in our view is the fact that none of the dismissed plaintiffs signed the grievance allegedly filed on their behalf. Indeed, at least one did not even know that a grievance had been filed until long after the grievance process had begun.

Nor do we believe that plaintiffs fall within the futility exception to the exhaustion requirement as constructed by the Supreme Court. Normally, an employee "must attempt use of the contract grievance procedure agreed upon by employer and union as the mode of redress." *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652 (1965). However, an exception to this rule exists where an aggrieved employee can show that pursuit of contractual remedies would be "futile." *Glover v. St. Louis-San Francisco Ry.*, 393 U.S. 324, 330 (1969). This Circuit requires a "clear and positive showing" that pursuit of grievance

procedures would be futile before allowing access to federal courts on Section 301 claims. *Terwilliger v. Greyhound Lines*, 882 F.2d 1033, 1039 (6th Cir. 1989), *cert. denied*, 495 U.S. 946 (1990) (relying on *Miller v. Chrysler Corp.*, 748 F.2d 323, 326 (6th Cir 1984).

Here, plaintiffs ground their futility argument in union representative Russell Albright's alleged hostility toward their grievance. However, as noted by the district court, Albright's handling of the grievance, while perhaps less than vigorous, was not "hostile." Plaintiffs have submitted no evidence showing anything worse than a perfunctory response by Albright to Wilson's claim. While this may tend to establish a breach of the union's duty of fair representation, it does not establish hostility such that plaintiffs may now be excused from having failed to pursue available contractual grievance procedures.

In sum, the district court appropriately awarded summary judgment in favor of the defendants and dismissed plaintiffs Wadding, Schmitt, Lyons, Claybourne, and Kerr from the lawsuit.

B.

Plaintiff Wilson next claims that the district court erred in refusing to grant him recovery for his attorneys' fees. We first address Wilson's claim for attorneys' fees against Local 92.

Under the American Rule, unless a contract or a statute expressly authorizes an award of attorneys' fees, "the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser." *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975).

However, we have held that attorneys' fees are recoverable as *damages* against union defendants in Section 301 actions. *Scott v. Local Union 377, International Brotherhood of Teamsters*, 548 F.2d 1244, 1246 (6th Cir.), *cert. denied*, 431 U.S. 98 (1977). In *Scott*, we stated:

> The Supreme Court in *Alyeska* reaffirmed the traditional American rule that attorney fees are not ordinarily recoverable by the prevailing litigant in federal litigation in the absence of statutory authorization. We do not read the decision as in any was affecting those cases in which the attorney fees are not an award to the successful litigant in the case at hand, but rather are the subject of the law suit itself. More particularly, we do not understand that the decision in *Alyeska* in any way affects the measure of damages which can be awarded to a prevailing plaintiff in a suit for a breach of a union's duty of fair representation in an action under [Section] 301.

Id. In other words, in Section 301 cases the damages arising from a union's breach of its duty of fair representation include the attorneys' fees reasonably incurred in pursuing a claim against the employer for breach of the collective bargaining agreement. *Id.*

In its memorandum opinion denying Wilson's claim for attorneys' fees, the district court acknowledged this Court's decision in *Scott*. However, the district court believed that the Supreme Court's later decision in *Summit Valley Indus., Inc. v. Local 112, International Brotherhood of Carpenters*, 456 U.S.

717 (1982), undermined *Scott's* holding that attorneys' fees were recoverable as damages against a union in Section 301 actions. Accordingly, the district court denied Wilson's claim for attorneys' fees.

We disagree with the district court's conclusion. In *Summit Valley*, the Supreme Court held that attorneys' fees were not recoverable damages in a suit brought pursuant to Section 303 of the Labor Management Relations Act, 29 U.S.C. § 187. *Id.* at 722-24. That provision allows employers injured by a union's unfair labor practice to bring suit against the union for damages. The Court's decision proceeded from an analysis of Section 303's express language and Congressional intent peculiar to the enactment of Section 303. Unlike Section 301, Section 303 contains an express remedial provision, and the Court, in its analysis of Section 303, also concluded that Congress did not intend the damages provision to encompass attorneys' fees incurred by the employer in bringing suit against the union. Further, "since a union does not owe a duty of fair representation to the employer, the latter's expense incurred in obtaining legal representation is not 'the harm itself,' " as it is in Section 301 cases. *Bennett v. Local Union No. 66*, 958 F.2d 1429, 1440 n.9 (7th Cir. 1992). The Seventh Circuit in *Bennett* and the Ninth Circuit in *Zuniga v. United Can Co.*, 812 F.2d 443, 454-55 (9th Cir. 1987), both reached a similar conclusion when assessing the scope of *Summit Valley's* holding. We agree with the reasoning of both cases and therefore hold that *Summit Valley* does not undermine this Court's decision in *Scott.*[1]

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1. Indeed, this Circuit has allowed awards of attorneys' fees to successful plaintiffs in Section 301 actions in cases arising after *Summit Valley* was decided, although the panels in those decisions did not address the effect of *Summit Valley* on our holding in *Scott*. *See Allen v. Allied Plant Maintenance Co.*, 881 F.2d 291, 298-99 (6th Cir. 1989); *Bagsby v. Lewis Brothers, Inc.*, 820 F.2d 799, 801 n.3 (6th Cir. 1987).

Accordingly, Wilson was entitled to recover from the union his reasonable attorneys' fees expended in pursuing his claim against Matlack and Casol Leasing.[2]

Wilson's claim for attorneys' fees against defendant employers Matlack and Casol Leasing, however, is subject to the American Rule, which states that attorneys' fees are not normally recoverable absent statutory or contractual authority. *Alyeska Pipeline*, 421 U.S. at 257. The rule is subject to certain equitable exceptions, i.e. the common benefit or common fund exceptions, the "willful disobedience of a court order" exception, and the bad faith exception. *Id.* at 257-59. Wilson attempts to fit his claim for attorneys' fees against Matlack and Casol Leasing within the bad faith exception to the traditional rule, essentially claiming that Matlack and Casol Leasing acted in bad faith by defending this lawsuit.

Wilson's claim fails. Wilson has presented to this Court no evidence of Matlack's or Casol Leasing's bad faith in defending this lawsuit, other than his claim that they knew they had violated the collective bargaining agreement. However, the record is clear that Matlack and Casol Leasing did not know they had violated the collective bargaining agreement; indeed, they argued vehemently at trial and to this Court that they did not. We see nothing in the record indicating that the defendants pursued their defenses in bad faith.

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2. Our holding in *Knollwood Cemetery Ass'n v. United Steelworkers*, 789 F.2d 367, 369 (6th Cir. 1986), is not to the contrary. Although we stated that "§ 301 of the [Labor Management Relations Act] does not authorize an award of attorney fees as an element of damages," and cited *Summit Valley* as support, the case involved a *union's* request that the cost of its attorneys' fees be borne by the employer. Because an employer does not owe a duty of fair representation to a union, the failure to provide legal representation clearly did not represent an element of the union's damages in that case, and the Court appropriately applied the traditional rule against awarding attorneys' fees on those facts.

C.

Wilson next claims that the district court erred in striking his request for punitive damages against Matlack and Casol Leasing. This Circuit has not determined whether punitive damages are recoverable against an employer for breach of a collective bargaining agreement, although it is clear that punitive damages are not available against a union for breach of the duty of fair representation. *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42,52 (1979); *Farmer v. ARA Servs., Inc.*, 660 F.2d 1096, 1106-07 (6th Cir. 1981). Our research revealed very little case law on this precise issue. Those courts considering the matter have held either that punitive damages against the employer are unavailable under Section 301, *United Steelworkers v. Connors Steel Co.*, 855 F.2d 1499, 1510 (11th Cir. 1988), *cert. denied* 489 U.S. 1096 (1989), or that punitive damages generally are unavailable absent a showing that the employer's conduct is something more egregious than a simple breach of contract. *E.g., Merk v. Jewel Food Stores Div. of Jewel Co.*, 945 F.2d 889, 899 (7th Cir. 1991), *cert. denied*, 504 U.S. 914 (1992).

We need not decide whether punitive damages can ever be awarded against an employer in Section 301 suits. Even if we were to conclude that punitive damages are available in appropriate circumstances, the defendants' conduct in this case is not sufficiently "outrageous" or "egregious" to warrant an award of punitive damages against them. *See Butler v. Local 823, International Brotherhood Of Teamsters*, 514 F.2d 442, 454 (8th Cir.), *cert. denied* 423 U.S. 924 (1975).

Appendix B

III.

A.

Matlack, along with Casol Leasing and Local 92, makes several objections to the award of damages to Wilson. As proof of damages, Wilson introduced at trial a "road guide" booklet summarizing the various pension plans available under the collective bargaining agreement and testified concerning the amounts available under the "30 and out" plan. Very broadly, the "30 and out" plan provided for increased pension benefits under certain circumstances for employees with at least thirty years employment with Matlack. Wilson testified that he "wanted" to be eligible for this pension plan, and testified concerning his lost pension benefits based on the assumption that he did qualify for the "30 and out" plan. However, he did not introduce any specific evidence of his ability to qualify under the requirements of the "30 and out" plan. The defendants, for whatever reason, chose not to argue to the jury at trial that Wilson was not eligible for benefits under the "30 and out" plan. Instead, the defendants waited until after trial, in response to the district court's request for evidence on the damages issue, to present expert affidavits questioning Wilson's eligibility under the "30 and out" plan.

Matlack now claims that the district court erred in calculating the proper amount of Wilson's damages. At trial, the jury awarded Wilson $456,000.00 in pension benefit damages, presumably based on the "30 and out" pension plan contained in the parties' collective bargaining agreement. After trial, the district court, noting that the jury failed to discount the pension award to reflect its present value, held that a new trial would be granted if Wilson failed to accept a remittitur of the jury's award. In a post-trial memorandum opinion and order, the court

pointed out that neither party requested a specific present value instruction, nor did they introduce detailed present value testimony at trial. The court's *sua sponte* instruction to the jury on this issue, characterized by the district court itself as "grossly inadequate," stated: "In this case, Mr. Wilson has limited his claim for damages to lost pension benefits. You are instructed that the burden is on Mr. Wilson to prove by a preponderance of the evidence the amount of lost pension benefits he is due reduced to present value." Unfortunately, the jury awarded an amount far in excess of any possible present value of Wilson's pension benefit damages.

The defendants subsequently made a motion for a new trial or remittitur of the damages award. After concluding that the defect in its jury instructions did not warrant a new trial, the district court held that Wilson was entitled to $133,296.83 in present value damages, an amount which reflected "the maximum possible present value of [the] largest pension benefit to which Wilson would have been entitled." Wilson timely accepted this remittitur.

The defendants each object to the amount of the damages award as calculated by the district court. Matlack argues that the district court erred in concluding that Wilson was entitled to $133,296.83, claiming that this amount erroneously assumes that Wilson was entitled to "30 and out" pension benefits. Matlack asserts that Wilson failed to establish that he would have been eligible for the "30 and out" pension plan at trial, and that the district court correspondingly erred by calculating a remittitur amount based upon Wilson's eligibility for that plan.

Casol Leasing argues that the district court improperly instructed the jury to allow for an award of front pay damages, claiming that an award of front pay pension benefits is

inappropriate in this case. Union defendant Local 92 claims both that the district court erred in instructing the jury on damages and that Wilson failed to prove by a preponderance of the evidence his entitlement to lost pension benefits.

After careful review of the testimony and exhibits presented at trial, we affirm the district court's calculation of Wilson's damages. We review the district court's decision on a motion seeking a remittitur of the jury's award for an abuse of discretion. *Roush v. KFC Nat'l Management Co.*, 10 F.3d 392, 397 (6th Cir. 1993), *cert. denied*, 115 S. Ct. 56 (1994). In general, we will not vacate a damage award unless we are left with a "definite and firm conviction that a mistake resulting in plain injustice has been committed." *Black v. Ryder/P.I.E. Nationwide*, 970 F.2d 1461, 1470 (6th Cir. 1992); *Meyers v. City of Cincinnati*, 14 F.3d 1115, 1119 (6th Cir. 1994) (stating that damage awards are a question of fact to be reviewed under the clearly erroneous standard). In Section 301 cases, the district court has broad discretion in fashioning an appropriate remedy under the overarching principle of federal labor law to "compensate for injuries caused by violations of employees' rights." *Foust*, 442 U.S. at 48-49 (citations omitted). The district court's primary goal should be to ensure that the "relief in each case [is] fashioned to make the injured employee whole." *Id.* at 49 (citation omitted). In addition, we note that, although proof of damages cannot be too remote or speculative, *Broan Mfg. Co. v. Associated Distrib., Inc.*, 923 F.2d 1232, 1235 (6th Cir. 1991), where the fact of damage has been established, a lesser quantum of proof is necessary to establish the amount. *Id.; Local 984, International Brotherhood of Teamsters*, 287 F.2d 231, 243 (6th Cir.), *cert. denied*, 366 U.S. 962 (1961).

Here, we believe the district court was within its discretion in granting a remittitur of $322,703.17. The final damages

award of $133,296.83 was a present value amount based on Wilson's eligibility to receive pension payments after he reached age fifty under the "30 and out" plan. Although the district court's opinion granting a remittitur is somewhat less than clear on this issue, our review of the record leads us to conclude that Wilson submitted sufficient evidence to allow the jury to award damages based on the "30 and out" pension plan.

At trial, Wilson submitted a pension plan booklet detailing the various pension plans available under the Central States Agreement, the collective bargaining agreement in effect, and two copies of previous agreements between the parties detailing increasing employer contribution rates in accordance with pension plan requirements. In addition, Wilson testified at trial that he would have received $2,000 per month in pension benefits after reaching age fifty. The jury was entitled to infer from this evidence that Wilson's damages should be calculated based on the assumption that Wilson qualified for the "30 and out" plan. The defendants had ample opportunity at trial to cross-examine Wilson as to his eligibility for these benefits and to introduce evidence rebutting Wilson's testimony. Post hoc evidence that Wilson was not in fact qualified for the "30 and out" plan, not submitted at trial or presented to the jury, cannot be used to undermine the jury's verdict.

Similarly, although it is a close issue, we believe the award of front pay damages is appropriate in this case. The decision to award front pay damages is "governed by the sound discretion of the trial court." *Davis v. Combustion Eng'g, Inc.*, 742 F.2d 916, 923 (6th Cir. 1984). No per se rule governs the appropriateness of front pay damages in a particular case. *Cf. Suggs v. Servicemaster Educ. Food Management*, 72 F.3d 1228, 1234 (6th Cir. 1996) (listing factors to be considered in awarding front pay damages). Certainly, the age of the

employee is an important factor in determining whether the award of front pay pension benefits is warranted. *Davis*, 742 F.2d at 923. However, this factor is not conclusive. Ultimately, the question to be answered is whether front pay damages are needed in a particular case to make the Plaintiff whole. Here, although we might have decided the issue differently, we cannot say that the district court abused its discretion in determining that a front pay award was appropriate to compensate Wilson for his injuries.

In sum, finding no "plain injustice" in the award of damages in this case, we reject defendants' attacks on the existence and amount of Wilson's damage award.

B.

Matlack also claims that the district court erred by denying its motion for judgment as a matter of law on the ground that Wilson's claims were barred by the statute of limitations. The statute of limitations for filing a hybird Section 301/duty of fair representation claim is six months. *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 169 (1983); *Schoonover v. Consolidated Freightways Corp.*, 49 F.3d 219, 221-22 (6th Cir. 1995). Such a claim accrues when an employee discovers, or should have discovered with exercise of due diligence, acts giving rise to the cause of action. *Chrysler Worker Ass'n v. Chrysler Corp.*, 834 F.2d 573, 578 (6th Cir. 1987), *cert. denied*, 486 U.S. 1033 (1988). Perhaps most importantly, a party is not required to sue on a hybird claim until the arbitration panel renders its final decision, or until the party reasonably should know that the union has abandoned the party's claim. *Schoonover*, 49 F.3d at 222.

The district court properly denied Matlack's motion. Judgment as a matter of law is proper where "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Fed. R. Civ. P. 50(a). Here, Wilson introduced evidence that he became aware of union representative Albright's failure to diligently pursue his claim sometime after May 20, 1991. Wilson filed this claim on November 20, 1991, less than six months later. Sufficient evidence exists to allow the jury to conclude that Wilson filed his claim within the applicable six month statute of limitations, and the district court properly denied Matlack's motion for judgment as a matter of law.

IV.

A.

The defendants make several objections to the district court's construction of the collective bargaining agreement and its instructions to the jury in accordance with that construction. When reviewing objections to jury instructions, we keep in mind that:

> When instructions are challenged on appeal, our duty is not to read the instructions word for word in search of an erroneous word or phrase. Rather, our task is to review the instructions as a whole in order to determine whether they adequately inform the jury of the relevant considerations and provide a basis in law for aiding the jury in reaching its decision.

O-SO Detroit, Inc. v. Home Ins. Co., 973 F.2d 498, 502 (6th Cir. 1992) (citations and internal quotations omitted). Our review of the record as a whole indicates that the district court's instructions adequately informed the jury of the issues presented and the applicable law.

The defendants take issue with the district court's instruction to the jury regarding Section 5.5(b)(2) of the collective bargaining agreement. Section 5.5(b)(2) provides:

> When a branch, terminal, division or operation is closed and the work of the branch, terminal, division or operation is transferred to another branch, terminal, division or operation in whole or in part, an employee at the closed or partially closed branch, terminal, division or operation shall have the right to transfer to the branch, terminal, division or operation into which the work was transferred if regular work is there available.

In instructing the jury regarding Matlack's obligations under this section of the collective bargaining agreement, the district court stated:

> Article 5, Section 5.5(b)(2) of the Central States Contract governs Matlack's duties to Mr. Wilson if the work of the Canton Matlack Terminal was transferred. You must determine whether Mr. Wilson has established by a preponderance of the evidence that the work of the Canton

> Matlack Terminal was transferred, in whole or in part, to Matlack's Akron facility.
>
> . . .
>
> You are instructed that Matlack transferred some or all of the work of its Canton Terminal to its Akron operation under Article 5, Section 5.5(b)(2), if Mr. Wilson has shown by a preponderance of the evidence that, at the time that Matlack closed its Canton Terminal, Matlack planned to transfer some or all of its work of the Canton Terminal to its Akron operation and that subsequently Matlack carried through on its plan.
>
> If you find that Matlack hired persons for regular work at the Akron operation, but Matlack did not inform Mr. Wilson of his right, according to seniority, to transfer to the Akron operation into which some or all of the work of the Canton Matlack Terminal was transferred, then you are instructed that Matlack breached its duty to Mr. Wilson under Article 5, Section 5.5(b)(2) under the Central States Contract.

In addition, the district court gave the jury a general instruction regarding the duty to speak, stating that:

> [T]he law may impose an affirmative duty to speak on an individual or

> corporation. A duty to speak will arise in any situation where a party imposes special confidence in the other because of that person's position, and the other person knows of this confidence. You may consider whether the parties to the Central States Contract had a mutual understanding that union members of Local 92, like Mr. Wilson, placed a special confidence in Matlack to tell them about the existence of new Matlack operations in the Central States Area because the Central States Contract obligated Matlack to give those union members work rights at such operations.

Matlack objects to this "duty to speak" instruction, claiming that it is contrary to the theory of federal labor law that the collective bargaining relationship is adversarial. *See NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 488-89 (1960). We agree that this instruction was erroneous, but do not find it to be sufficiently prejudicial such that a new trial is warranted. The nature of the relationship between a union employee and an employer is not such that the law imposes upon the employer a duty to speak based upon the trust and confidence the employee has imposed upon the employer. However, pursuant to Section 5.5(b)(2) of the collective bargaining agreement, it was entirely reasonable for the jury to conclude that Matlack undertook a contractual obligation to inform employees of a closed terminal about the existence of regular work transferred from the closed terminal to an operating terminal. Accordingly, Matlack's "duty to speak," although not arising from a relationship of trust and confidence, certainly could have arisen from the contractual obligation it undertook pursuant to Section5.5(b)(2).

Appendix B

Keeping in mind that we review the district court's jury instructions as a whole and will not reverse unless those instructions are confusing, misleading, or prejudicial, we conclude that any errors made by the district court here did not unduly prejudice the jury's result. The jury was entitled to find that Matlack had a contractual duty to speak under Section 5.5(b)(2) of the collective bargaining agreement.

B.

Defendant Casol Leasing takes issue with the district court's instruction to the jury that it could find Casol Leasing to be Matlack's "alter ego," and therefore liable to Wilson for breach of the Central States collective bargaining agreement. Casol Leasing insists that the "alter ego" doctrine applies only to situations in which a change in the corporate form allows an employer to evade collective bargaining obligations, and that common ownership and evidence of an intent to avoid labor agreements are essential to an alter ego claim. We disagree.

This Court extensively reviewed the alter ego doctrine in *NLRB v. Fullerton Transfer & Storage Ltd.*, 910 F.2d 331 (6th Cir. 1990). In *Fullerton Transfer*, we stated:

> The alter ego doctrine is most commonly used in labor cases to bind a new employer that continues the operations of an old employer in those cases where the new employer is "merely a disguised continuance of the old employer." *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106 (1942) . . . . Increasingly, the term also is applied to so-called double-breasted

> operations to determine whether two or more coexisting employers performing the same work are in fact one business, separated only in form. In both instances, the Board has formulated the test as "whether the two enterprises have substantially identical management, business, purpose, operation, equipment, customers, supervision, and ownership."

Id. at 336 (quoting *Nelson Elec. v. NLRB*, 638 F.2d 965, 968 (6th Cir. 1981) (footnote omitted). No one factor is dispositive in determining whether the corporate form should be disregarded in a particular case. Indeed, quoting *NLRB v. Deena Artware, Inc.*, 361 U.S. 398, 403-04 (1960), we further elaborated:

> [A]s Mr. Justice Cardozo said in *Berkey v. Third Avenue R. Co.*, 244 N.Y. 84, 95, 155 N.E. 58, 61 "Dominion may be so complete, interference so obtrusive, that by the general rules of agency the parent will be a principal and thesubsidiary an agent. Where control is less than this, we are remitted to the tests of honesty and justice." That is not a complete catalogue. The several companies may be represented as one. Apart from that is the question whether in fact the economic enterprise is one, the corporate forms being largely paper arrangements that do not reflect the business realities. One company may in fact be operated as a division of another; one may be only a shell, inadequately financed; the affairs of the group may be so intermingled that no

> distinct corporate lines are maintained. These are some, though by no means all, of the relevant considerations as the authorities recognize.

Fullerton Transfer, 910 F.2d at 339. Drawing upon the guidance provided by this Court in *Fullerton Transfer,* we think it clear that common ownership or an intent to evade federal labor law obligations are not necessary prerequisites to a finding of alter ego status.

In addition, we have held that "[a] determination of alter ego status is a question of fact." *NLRB v. Allcoast Transfer, Inc.,* 780 F.2d 576, 579 (6th Cir. 1986). Here, Wilson introduced evidence that Matlack and Casol shared the same corporate headquarters and exchanged employees. Further, at least one Matlack official periodically represented Casol Leasing during labor negotiations. Finally, it appears that Matlack supervised the truck drivers hired by Casol Leasing at Matlack facilities, including the Canton terminal. From this evidence, we believe that the jury was entitled to conclude as a matter of fact that Casol Leasing was merely Matlack's alter ego at the Canton terminal. We also believe that, although perhaps not perfect, the instructions on this issue adequately informed the jury of the considerations relevant to a finding that alter ego status existed. The defendants' remaining objections to the district court's instruction to the jury are without merit.

In sum, we find no error requiring reversal of the jury's verdict as to defendants' liability to Wilson, and AFFIRM that portion of the judgment. However, because the district court erred in determining that Wilson could not recover his attorneys' fees against Local 92, we REVERSE and REMAND for a further damages hearing consistent with this opinion.

APPENDIX C — JUDGMENT ENTRY OF THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF OHIO FILED JULY 13, 1994

DOWD, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 5:91 CV 2348

James Wilson,

Plaintiff,

vs.

Matlock, Casol Leasing, Teamsters Local 92,

Defendants.

JUDGMENT ENTRY

The jury's answers to interrogatories resulted in a judgment entry in favor of the plaintiff in the sum of $456,000 against the defendants Matlack and Casol Leasing and Local 92 with the defendants Matlack and Casol Leasing being required to pay the sum of $342,000 and the defendant Local 92 being required to pay $114,000 (Docket No. 316).

Motions were filed by the defendants following the entry of a judgment and resulted in the Court's Order of July 1, 1994 granting the motions for new trial unless the plaintiff accepted a remittitur of $133,296.83 (Docket No. 363).

Appendix C

The plaintiff timely filed his written acceptance of the remittitur (Docket No. 373).

WHEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is granted the plaintiff against the defendants, Matlack Inc. and Casol Leasing jointly and severally in the sum of Ninety Nine Thousand Nine Hundred Seventy Two Dollars and sixty two cents ($99,972.62) and judgment is granted the plaintiff James Wilson against the defendant Local 92 of the Teamsters Union in the sum of Thirty Three Thousand Three Hundred Twenty Four Dollars and twenty one cents ($33,324.21). Plaintiff's costs, exclusive of attorney fees, to be paid and apportioned among the defendants on a 75-25% basis. CASE CLOSED.

s/ David D. Dowd, Jr.
David D. Dowd, Jr.
U.S. District Judge

APPENDIX D — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF OHIO FILED JULY 1, 1994

DOWD, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 5:91 CV 2348

James Wilson, et al.,

Plaintiffs,

vs.

International Brotherhood of Teamsters, et al,

Defendants.

MEMORANDUM OPINION

I. INTRODUCTION

Plaintiff James Wilson and five others filed this action under section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, against several defendants including his former employer, Matlack, Inc.; a second entity, Casol Leasing, Inc.; and his union, Teamsters Local Union No. 92. Only Wilson's claims survived summary judgment. After a seven-day trial, a jury rendered a verdict in Wilson's favor in the amount of $456,000, apportioning liability 25% to the Local 92, and 75% to Matlack and Casol jointly and severally.

Appendix D

Defendants have moved for remittitur and new trial. *See* Casol's Mot. for New Trial or for Remittitur, Docket No. 320-2 & 320-3; Matlack's Mot. for New Trial or to Alter J., Docket No. 322-2 & 322-3; and Local 92's Mot. for New Trial, Docket No. 324, or for Remittitur, Docket No. 326. Wilson moves for attorney fees. *See* Pla.'s Fee Application Docket No. 319 & Supplemental Mem. Docket No. 355.

For the reasons set forth below, Defendants' motions for new trial or remittitur are granted on the issue of damages contingent on Wilson's refusal to accept remittitur of the jury's damage award to $133,296.83. Wilson's application for attorney fees is denied.

II. FUTURE BENEFIT DAMAGES

A. *Damages Evidence and the Present Value Instruction.*

The relevant portion of the Court's instruction on damages stated: "In this case, Mr. Wilson has limited his claim for damages to lost pension benefits. You are instructed that the burden is on Mr. Wilson to prove by a preponderance of the evidence the amount of lost pension benefits he is due reduced to present value." The court gave its present value instruction despite the failure of the parties to make a request for a more specific instruction.[1]

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1. Upon reflection, the Court believes that its present value instruction, unaided by assistance from counsel, was grossly inadequate. The Court has just finished a case involving alleged medical malpractice resulting in cerebral palsy and advised the jury with respect to present value as follows:

(Cont'd)

Appendix D

The parties introduced no expert testimony on the present value of Plaintiff's lost pension benefits. Plaintiff explained his entitlement to the pension benefits through the use of mortality tables, and the "Central States Road Guide" pension benefit handbook which outlined weekly contribution rates and monthly retirement benefit schedules for several different types of pensions, including the "Regular Pension," the "Deferred

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(Cont'd)

PRESENT VALUE OF FUTURE LOSS

If you find that the plaintiff's damages are reasonably certain to continue in the future, then you must determine the present value in dollars of such future damage, since the award of future damages necessarily requires that payment be made now in one lump sum and the plaintiff will have the use of the money now for a loss that will not occur until some future date. You must decide what those future losses will be and then make a reasonable adjustment for the present value.

In order to make a reasonable adjustment for the present use, interest free, of money representing a lump-sum payment of anticipated future loss, the law requires that the jury discount, or reduce to its present worth, the amount of the anticipated future loss by taking (1) the interest rate or return which the plaintiff could reasonably be expected to receive on an investment of the lump-sum payment, together with (2) the period of time over which the future loss is reasonably certain to be sustained, and then deduct from the total amount of anticipated future loss whatever the total amount would be reasonably certain to earn or return, if invested at such rate of interest over such future period of time.

Pension," the "20 Year Deferred Pension," the "Contribution-Based Pension," the "Partial Pension," and the four types of contributory pensions, *i.e.*, the "30-And-Out," "Contributory Credit Pension," "Transition Pension," and "New Transition Pension." In particular, Plaintiff claimed an entitlement to the "30-And-Out" contributory pension with retirement benefits of $2,000 per month.

Defendants contend that Plaintiff failed to introduce sufficient proof on damages, and the present value of those damages. Plaintiff contends that the proof he introduced on damages was sufficient and that the Court's *sua sponte* instruction on present value adequately supports the jury's verdict.

B. *Present Value Determinations of the Loss of Future Benefits.*

The Supreme Court in *Monessen Southwestern Ry. v. Morgan*, 486 U.S. 330 (1988) reiterated the long-standing rule that " 'damages awards in suits governed by federal law should be based on present value.' " *Id.* at 339 (quoting *St. Louis Southwestern Ry. v. Dickerson*, 470 U.S. 409, 412 (1985)). Where federal law governs, it is the jury's "task of making the present value determination." *Monessen*, 486 U.S. at 340. Moreover, the judge should not "pre-empt the jury's function" on the calculation of present value damages by either instructing as to a pre-determined discount or other interest rate. *Id.* at 340-41. Fundamentally, the present value rule assures that a damage award for future benefits does not "afford more than compensation" by failing to take into account the earning power of money. *E.g., Chesapeake & Ohio Ry. v. Kelly*, 241 U.S. 485, 489, 491 (1916). Although "no single method for

determining present value is mandated by federal law," a present value calculation "should take into account inflation and other sources of wage increases as well as the rate of interest . . . ." *Dickerson*, 470 U.S. at 412 (summarizing *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983)).

It is clear that for actions asserting claims under federal law, "an utter failure to instruct the jury that present value is the proper measure of a damages award [for future benefits] is error." *Dickerson*, 470 U.S. at 412.[2] What the parties dispute in this case is not this general proposition, but its application to a case where there is a failure by both sides (1) to request a specific present value instruction and (2) to introduce detailed present value testimony. As will be explained, this is not a unique situation, but is one that has been reported with some frequency by the federal courts.

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2. The Supreme Court in *Louisville & Nashville R.R. v. Holloway*, 246 U.S. 525, 528 (1918) addressed a slightly different question than addressed in *Dickerson*, *supra*. In *Dickerson* the trial court erroneously refused a present value instruction that was requested, 470 U.S. at 410, while in *Holloway* the Supreme Court affirmed a future damages award which lacked a present value instruction where the defendant failed to ask for a present value instruction despite its undoubted right to do so. 246 U.S. at 528. There are many legitimate tactical reasons why a party may not wish to emphasize present value to a jury, and the decisions of *Holloway* and *Dickerson* are consistent in that they allow the litigants to pursue that avenue if they see fit. *See Kokesh v. American S.S. Co.*, 747 F.2d 1092, 1096 (6th Cir. 1984), as discussed *infra*. The Supreme Court's decision in *Monessen Southwestern Ry. v. Morgan*, 486 U.S. 330 (1988) which reiterated the *Dickerson* formulation of the present value rule in a case where the requested present value instruction was refused, 486 U.S. at 332, cited *Holloway* with approval. 486 U.S. at 340-41. Thus a party's failure to make a request for a present value instruction is still relevant under current law.

Appendix D

In *Pennsylvania R.R. v. McKinley,* 288 F.2d 262 (6th Cir. 1961) the Sixth Circuit Court of Appeals reviewed a FELA case where a jury awarded $150,000 to compensate for plaintiff's lost future earnings. At trial neither plaintiff nor defendant offered any evidence suggesting a method of reducing an award of future damages to present worth. *Id.* at 263. The plaintiff, as was the case here, introduced mortality tables. *Id.* at 266. The jury charge did not mention "present value" per se, but did instruct that damages for future earning capacity should be the "money value" that would "compensate" for those lost earnings. *Id.* at 265.

The Sixth Circuit Court of Appeals held that as "[j]urors are presumed to be intelligent people, generally aware, from today's economy and their own experience with it, of the earning value of money when placed in safe investments . . . ," the district court's instruction that the jury should determine the "money value" which would "compensate the plaintiff for all such loss of past, present and future earning capacity as you find he has suffered or will suffer" was sufficient despite the lack of specific present value evidence, absent a request for a more elaborate instruction. *Id.* at 265.

The court in *Pennsylvania R.R.* rejected defendant's contention that because plaintiff introduced no testimony regarding a "specific method of reducing money paid for future damages to present worth" — either through expert testimony or through the use of annuity tables and interest rates — plaintiff should be deemed to have failed to meet his burden of proof on the issue of damages. 288 F.2d at 263-64. In rejecting defendant's argument, the Sixth Circuit interpreted the Supreme Court's decision in *Louisville & Nashville Ry. v. Holloway,* 246 U.S. 525 (1918), "as holding that a jury, unaided

by specific testimony as to money values, could themselves, being told that the award should be only money value, properly apply the applicable rule." *Pennsylvania R.R.*, 288 F.2d at 265. Although "standard annuity tables, expert evidence as to [the] earning power of money safely invested, and like testimony would have been admissible," they were not essential where the district court had instructed the jury to reduce future damages to present value and the parties had not made a more detailed request to set out the applicable rule. *Id.* at 265-66. As Justice Brandeis stated in *Western & Atlantic R.R. v. Hughes*, 278 U.S. 496, 498 (1929) (a case where the plaintiff introduced mortality tables, the defendant introduced annuity tables, and the jury awarded future damages without further present value testimony), "[i]f more detailed instructions were desired, it was incumbent upon the [defendant] to make request therefor. *Louisville & Nashville R.R. v. Holloway*, 246 U.S. 525 [(1918)]. It did not do so."[3]

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3. Other circuits have come to similar conclusions. *E.g.*, *Duncan v. St. Louis-San Francisco Ry. Co.*, 480 F.2d 79, 87 (8th Cir.) (general instruction that future damages should be reduced to present value was sufficient, in the absence of defendant's request for a more specific charge), *cert. denied*, 414 U.S. 859 (1973); *Heater v. Chesapeake & Ohio Ry.*, 497 F.2d 1243, 1249-50 (7th Cir.) (Where the parties failed to introduce evidence on a method of computing present value and where defendant failed to request a detailed jury instruction explaining a method of computing present value, the court's instruction to reduce an award of future earnings to "present cash value" — which term was defined — without providing any method of computing that value, was not erroneous.), *cert. denied*, 419 U.S. 1013 (1974); *Bonura v. Sea Land Serv., Inc.*, 505 F.2d 665, 669 (5th Cir. 1974) ("We hold only that such actuarial and mathematical evidence is not an absolute prerequisite to the submission of an instruction on lost future wages when evidence of such a loss [of future wages] has been presented."); *Cassino v. Reichhold Chems., Inc.*, 817 F.2d 1338, 1347-48 (9th Cir. 1987) (Where the Court's jury

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Defendants do not discuss the *Pennsylvania R.R.* precedent or the cases that follow its approach, but cite instead *Rodgers v. Fisher Body Div.*, 739 F.2d 1102, 1106-07 (6th Cir. 1984), *cert. denied*, 470 U.S. 1054 (1985) to suggest that courts should include instructions on present value damages regardless of whether the parties have made a request for such an instruction, and regardless of whether any objection to the jury charge was made. Defendants misinterpret *Rogers*.

In *Kokesh v. American S.S. Co.*, 747 F.2d 1092 (6th Cir. 1984), the Court of Appeals explained *Rogers* and the conflicting concerns in present value cases which militate against any per se rule when a court gives a present value instruction:

> Litigants in the federal courts frequently agree to forego the time and expense involved in proving inflationary trends and discount rates in trials involving lost future wages. In many cases defense counsel may wisely conclude that there is little benefit to be gained and substantial prejudice to be

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instruction adequately defined present value, the defendant could not challenge the jury's front pay award based on the lack of expert testimony.), *cert. denied*, 484 U.S. 1047 (1988). *See also Baynum v. Chesapeake & Ohio Ry.*, 456 F.2d 658, 660-61 (6th Cir. 1972) (Where the proper instruction is given, expert testimony on the present value of future damages is unnecessary.). *But see Ballantine v. Central R.R. of N.J.*, 460 F.2d 540, 543-44 (3d Cir.) (requiring expert or actuarial evidence concerning present value of future loss or mathematical guidance on the method of reducing such awards to present value before submitting the issue to the jury), *cert. denied*, 409 U.S. 879 (1972).

> risked in giving the jury a very particularized instruction on the calculation of damages. . . .
>
> We see no reason to question the jury instructions solely because they did not include a charge on reducing future damages to present worth, an instruction which neither party requested or evidently desired.

Kokesh, 747 F.2d at 1096 (interpreting *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983) and limiting *Rodgers v. Fisher Body Div.*, 739 F.2d 1102, 1107 (6th Cir. 1984) to its facts). *Compare Murphy v. National R.R. Passenger Corp.*, 547 F.2d 816, 817 (4th Cir. 1977) (Expert testimony or actuarial tables on present value may be admitted and "the court, *on request*, should also explain a method of calculating present value at a rate of interest to be determined by the jury in light of prevailing economic conditions.") (emphasis added) (citations omitted).

In 1989 the Sixth Circuit again addressed the *Rogers* present-value precedent which had been explained in *Kokesh*. In *Chonich v. Wayne County Community College*, 874 F.2d 359 (6th Cir. 1989), the Sixth Circuit held that the district court's "failure to instruct the jury to reduce to present value any reasonably demonstrated loss of future earnings fatally inflects *this* jury award." *Chonich*, 874 F.2d at 369 (emphasis added). In *Chonich*, the Sixth Circuit found that the district court's failure to instruct on present value infected the future-earnings damage award because given the facts of that case the resulting award became "based on speculation" and "unconscionably excessive, particularly where plaintiff's damage claims were

based on a faulty compensation figure beyond the normal levels as established [at trial] virtually without contradiction." 874 F.2d at 369. Properly read, the *Chonich* decision does not endorse the per se rule that Defendants suggest. *See also Broan Mfg. Co., Inc. v. Associated Distribs., Inc.*, 932 F.2d 1146 (6th Cir. 1991) (Where neither party requested an instruction to reduce damages to present value or objected to its absence, a failure to give a present value instruction did not amount to plain error under the facts of the case.), *prior proceeding* 923 F.2d 1232, 1241 (6th Cir. 1991) ("It is elementary that in cases of present allowance for future loss a defendant is entitled to a discount to present value for the advance payment.") (citing *Monessen v. Southwestern Ry. v. Morgan*, 486 U.S. 330, 339 (1988)).

C. *Remittitur and a New Trial.*

A motion for remittitur of a jury's verdict should be granted if the award clearly exceeds the amount which, under the evidence in the case, was the maximum that the jury reasonably could find to compensate for plaintiff's loss. *Roush v. KFC Nat'l Management Co.*, 10 F.3d 392, 397 (6th Cir. 1993) (citation omitted). Where "the fact of damage is uncertain," an attempt to award remote or speculative damages will preclude recovery; but "[o]nce the existence of damages has been shown," substantial evidence is all that is required to support a reasonable assessment of damages. *Grantham & Mann, Inc. v. American Safety Prods., Inc.*, 831 F.2d 596, 601-02 (6th Cir. 1987). Where an award of damages is clearly excessive, "a federal district court has the power to condition the denial of a motion for a new trial upon consent to a remittitur." *Smith v. John Swafford Furniture Co., Inc.*, 614 F.2d 552, 553 (6th Cir. 1980) (citing *Dimick v. Schiedt*, 293 U.S. 474 (1935)). Under

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Rule 59 a new trial may be granted on damages alone where liability has been competently determined by the jury, and it is plain that the damage issue is distinct and fairly separable from liability. *See Yehia v. Rouge Steel Corp.*, 898 F.2d 1178, 1184-85 (6th Cir. 1990) (citing *Gasoline Prods. Co., Inc. v. Champlin Ref. Co.*, 283 U.S. 494, 500 (1931) (new trial on damages alone is proper) and *Thompson v. Camp*, 167 F.2d 733, 734 (6th Cir.) (same), *cert. denied*, 335 U.S. 824 (1948)).

In the case of *Worden v. Consolidated Rail Corp.*, 689 F.Supp. 35 (D.Mass. 1988), the court held that the absence of evidence regarding particular methods of present value computation did not prohibit plaintiff from recovering damages for the impairment of his future earning capacity, but a new trial would be conditioned on a remittitur of the jury's award. *Id.* at 39 (interpreting *Monessen*, 486 U.S. 330 (1988) to require an instruction to reduce an award of future damages to present value, but refusing to interpret *Monessen* to require, "or even impl[y,] that expert evidence — or *any* evidence — on methods of present value computation is necessary to support a future earnings award.") (emphasis in original). *Compare Aldrich v. Baltimore & Ohio R.R.*, 866 F.2d 111 (4th Cir. 1989) (*en banc*) (interpreting *Monessen*, 486 U.S. 330 (1988) to require a retrial on damages for plaintiff's lost future earnings so that they may be adjusted to present value) *with Miller v. Union Pac. R.R.*, 900 F.2d 223, 225-26, 226 n. 1 (10th Cir. 1990) (following *Alma v. Manufacturers Hanover Trust Co.*, 684 F.2d 622, 626 (9th Cir. 1982) ("Where, as here, neither party provides competent evidence of the inflation rate or the discount rate, the district court [or the jury] must make a lump sum award that is not adjusted for either factor.") and distinguishing *Monessen*, 486 U.S. 330).

Here it is clear that the jury awarded damages for Wilson's lost pension benefits in excess of the maximum possible benefit reduced to present value. Given the evidence in the case, Wilson could have received a contributory pension for 30 years service at earliest at the age of 53 in January of 2006.[4] Despite the post-trial explanation by Wilson and Local 92 of the heightened pension contribution rates that might be negotiated by the Teamsters in the future,[5] the evidence at trial did not permit the inferences necessary to support the highest pension benefit claimed. Nevertheless there was sufficient evidence to support an entitlement to the Regular Pension, the Transition Pension, the New Transition Pension, the Partial Pension, and the Deferred Pensions.

Accordingly, the Court denies Defendants' motion for a new trial on the condition that Plaintiff accepts a remittitur of the jury's damage award to $133,296.83 which reflects the maximum possible present value of largest pension benefit to which Wilson would have been entitled as outlined above.[6] *Cf. Clissold v. St. Louis-San Francisco Ry.*, 600 F.2d 35, 40-41 (6th

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4. Wilson was born on December 2, 1952 and had 12.503 years of contributory credit as of June 1988.

5. Plaintiff has argued that the evidence permitted greater damages than even the jury awarded. *Cf. Vanskike v. ACF Indus., Inc.*, 665 F.2d 188, 211 (8th Cir. 1981) (An economist's expert opinion would be admissible even though the expert "assumed 3.9% annual 'productivity increase' based on a review of Teamsters Union bargaining agreements to project future lost wages. . . .") (citations omitted), *cert. denied*, 455 U.S. 1000 (1982). Whatever the merit of that argument, it was not placed before the jury and may not be considered here.

6. *See* Affidavit of Leo Martin filed by counsel for the plaintiff following the defendants' motions for remittitur.

Cir. 1979) (Where the district court erred in reducing damages for loss of future earnings to present value under Michigan law, the court of appeals could remit the damages award and affirm modified judgment as reduced to the maximum possible present value.). If Plaintiff rejects the Court's remittitur, there will be a new trial on the issue of damages.

III. ATTORNEY'S FEES UNDER HYBRID § 301 CASES, 28 U.S.C. § 185

Plaintiff's statutory cause of action under section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, does not explicitly provide for the award of attorney fees. Section 301 simply vests United States district courts with jurisdiction to adjudicate "[s]uits for violation of contracts between an employer and a labor organization . . . ." 29 U.S.C. § 185(a).

Generally, absent statutory authorization, a court adjudicating a federal claim may award attorney fees under the American Rule where (1) as a matter of equity, a party recovers "a fund for the benefit of others in addition to himself" and the court awards attorneys' fees "from the fund or property itself or directly from the other parties enjoying the benefit," *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 257-58 (1975); (2) there has been a willful disobedience of a court order as part of the fine to be levied for that disobedience; or (3) "the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons . . . ." *Id.* at 258-59 (citing *F.D. Rich Co., Inc. v. United States ex rel. Industrial Lumber Co., Inc.*, 417 U.S. 116, 129 (1974), *Vaughan v. Atkinson*, 369 U.S. 527 (1962), and *Universal Oil Prods. Co. v. Root Ref. Co.*, 328 U.S. 575, 580 (1946)).

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In *Scott v. Local Union 377*, 548 F.2d 1244, 1246 (6th Cir.), *cert. denied*, 431 U.S. 968 (1977) the Sixth Circuit held that the *Alyeska* decision did not preclude an award of attorneys' fees as damages against the union in a unfair representation case because the attorneys' fees were a "principal element of plaintiff's damages incurred to do that which the union was obliged but failed to do on his behalf." *Scott*, 548 F.2d at 1246. The *Scott* court recognized that attorney fees could not be imposed against an employer in a section 301 unfair representation case, but allowed the employee to recover attorney fees and other costs reasonably expended in prosecuting his claim against his employer because they were "costs which he would not have incurred but for the Union's breach of its duty to represent him fairly and good faith." 548 F.2d at 1246 (citing in part *Czosek v. O'Mara*, 397 U.S. 25, 29 (1970) (Where a union's discriminatory conduct relates only to a refusal to process a member's grievance, "damages against the union for loss of employment are unrecoverable except to the extent that its refusal to handle the grievances added to the difficulty and expense of collecting from the employer.")). Thus the *Scott* decision authorized the recovery of attorney fees pursuant to a federal cause of action where the attorney fees are the measure of actual damages, *i.e.*, "the subject of the law suit itself." 548 F.2d at 1266. *See also Anchor Motor Freight, Inc. v. International Bhd. of Teamsters*, 700 F.2d 1067, 1072 (6th Cir.) (relying on the *Scott* rationale to permit a union's recovery of attorney fees for an employer's breach of a covenant not to sue contained in the collective bargaining agreement), *cert. denied*, 464 U.S. 819 (1983); *Bagsby v. Lewis Bros., Inc. of Tenn.*, 820 F.2d 799, 801 n.3 (6th Cir. 1987) (same in dicta).

In spite of the *Scott* precedent, the Sixth Circuit has relied on the Supreme Court's decision in *Summit Valley Indus. Inc. v.*

Local 112, 456 U.S. 717 (1982), to hold that "[i]t is clear that § 301 of the LMRA does not authorize an award of attorney fees as an element of damages." *Knollwood Cemetery Ass'n v. United Steelworkers of Am.*, 789 F.2d 367, 369 (6th Cir. 1986) (employer's suit against union challenging arbitration proposed by NLRB regional director). Although the procedural posture of *Scott* and *Knollwood Cemetery* might serve as a basis to distinguish these two lines of authority, this Court concludes that the inescapable reasoning of the Supreme Court in *Summit Valley* indicates a disapproval of "the subject of the law suit" approach for analyzing requests for attorney fees in section 301 cases.

In *Summit Valley Indus. Inc. v. Local 112*, 456 U.S. 717 (1982) the Supreme Court held that attorney fees are not recoverable as part of the "damages" caused by the employer's breach of section 303(b) of the Labor Management Relations Act, 29 U.S.C. § 187. 456 U.S. at 723-26. Section 303(b) provides that those injured by the unfair labor practices of a union "shall recover the damages by him sustained and the cost of the suit." 29 U.S.C. § 187. At first glance it would appear that as between section 303(b) and 301 of the Act, section 303(b), with its explicit proviso for the recovery of "damages" and "costs" sustained as a result of a breach, provides a stronger basis to grant attorney fees than does section 301 which merely confers federal subject matter jurisdiction over state contract disputes affecting interstate commerce in the labor relations setting. Nevertheless, a unanimous Supreme Court rejected an interpretation of section 303(b) that would allow recovery for "damages" to extend beyond ordinary compensation for the business losses resulting from prohibited conduct. *See Summit Valley*, 456 U.S. at 723-24.

Importantly, the Supreme Court held that "[e]ven assuming that attorney's fees are necessary to achieve full compensation, this justification alone is not sufficient to create an exception to the American Rule in the absence of express congressional authority." *Summit Valley*, 456 U.S. at 724 (citing *F.D. Rich Co. v. United States ex rel. Industrial Lumber Co.*, 417 U.S. 116, 128-29 (1974)). Moreover, the Supreme Court rejected any interpretation of the American Rule that "would seem to require that fees be awarded whenever a defendant's wrongful conduct requires a plaintiff to incur more litigation expenses. . . ." *Summit Valley*, 456 U.S. at 725 n. 3. *Summit Valley* stands as an express rejection of any interpretation of the Labor Management Relations Act that allows for attorney fees as an item of consequential damages flowing from the breach of contract rights secured by a collective bargaining agreement. *See* 456 U.S. at 718 n. 1, *overruling in part Local Union 984 v. Humko Co.*, 287 F.2d 231, 241-42 (6th Cir.) (attorney fees incurred in securing injunction to remedy unfair labor practice), *cert. denied*, 366 U.S. 962 (1961).[7]

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7. Apparently the *Scott* court could not "conceive" "of what additional damages besides attorney fees might be shown to have been caused by a union's breach of its duty of fair representation . . . ." 548 F.2d at 1246. The mere realization that "the increment of damages caused by the union's breach of duty [might be] virtually *de minimus*," *St. Clair v. Local Union No. 515*, 422 F.2d 128, 132 (6th Cir. 1969), does not justify converting the Supreme Court's cautionary instruction in *Vaca v. Sipes*, 386 U.S. 171, 197-198 (1967) on the apportionment of damages between the employer and the union into an abrogation of the American Rule regarding consequential damages flowing from the breach of a contract. The existence of the concomitant duty of fair representation by the union does not alter the fundamental nature of the breach of contract jurisdiction conferred on this Court. The holding of *Czosek v. O'Mara*, 397 U.S. 25 (1970) is not to the contrary and its dicta concerning recovery for "the difficulty and expense of collecting from the

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In light of *Summit Valley Indus., Inc. v. Local 112*, 456 U.S. 717 (1982) and *Knollwood Cemetery Ass'n v. United Steelworkers of Am.*, 789 F.2d 367, 369 (6th Cir. 1986), the Court holds that Plaintiff would be entitled to an award of attorneys' fees under section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, only if he could demonstrate his entitlement to one of the traditional exceptions to the American Rule. Plaintiff claims he is entitled to attorney fees under the "common benefit" and "bad faith" exceptions to the American Rule.

In *Hall v. Cole*, 412 U.S. 1 (1973) the Supreme Court explained the "common benefit" exception to the American Rule. A plaintiff may recover attorney fees under this exception where his litigation confers "a substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them." *Hall v. Cole*, 412 U.S. at 5 (quoting *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 393-94 (1970)).

In this case Plaintiff has not succeeded in conferring a substantial benefit on other members of Local 92. Although the common benefit exception to the American Rule often provides for attorney fees in section 301 cases where the costs of suit may be passed through the union to all of its members who commonly benefit from a finding of the employer's breach, this case is unique in the singularity of the benefit gained. Given the

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employer," *id.* at 29, should not be read to authorize the recovery of attorney fees in light of *Summit Valley*, 456 U.S. 717 and *Knollwood Cemetery*, 789 F.2d 367. *But see, e.g., Bennett v. Local Union No. 66*, 958 F.2d 1429, 1440 n. 9 (7th Cir. 1992).

Court's prior disposition of the claims filed by the other members of Local 92, there is no evidence to indicate that anyone but Plaintiff could still benefit from a favorable resolution of this action.

Second, the Court may award attorney fees where "the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons. . . .' " *Alveska Pipeline Servs. Co. v. Wilderness Soc'y*, 421 U.S. 240, 258-59 (1975) (citing *F.D. Rich Co., Inc. v. United States ex rel. Industrial Lumber Co., Inc.*, 417 U.S. 116, 129 (1974)). Moreover, where a party is "callous in [ ] attitude" and "willful and persistent" in its denial of plaintiff's "clear" assertion of his entitlement to a federally secured right, the imposition of attorney fees is unquestioned. *See Vaughan v. Atkinson*, 369 U.S. 527, 530-31, 533 (1962).

Here, Plaintiff's success on his hybrid section 301 action has been far from clear. Although the parties have engaged in frequent and perhaps deleterious discovery disputes, the Federal Rules provide for an adequate opportunity to secure attorney fees in relation to such untoward conduct and do not justify a wholesale shifting of attorney fees under the circumstances of this case. *See* Fed. R. Civ. P. 37. Although this Court's interpretation of the unambiguous meaning of the Central States Collective Bargaining Agreement differed from the positions taken by Defendants in several crucial respects, it cannot be said that Defendants acted outside the bounds of proper advocacy when addressing Plaintiff's section 301 claims.

Plaintiff has failed to establish his entitlement to an award of attorney fees in this case. Plaintiff's application for attorney fees is denied without prejudice to renewal if this Court's

decision as to the validity of the claims of the five other plaintiffs is reversed on appeal.

IV. CONCLUSION

For the reasons set forth above, Defendants' motions for new trial or remittitur (Docket Nos. 320, 322, 324, & 326) are granted on the issue of damages contingent on Plaintiff's refusal to accept remittitur of the jury's damage award to $133,296.83. Plaintiff's application for attorney fees (Docket No. 319) is denied without prejudice to renewal if this Court's decision as to the validity of the claims of the five other plaintiffs is reversed on appeal.

The Plaintiff James Wilson is granted leave until 4:00 p.m. on July 11, 1994 to file, in writing, an acceptance of the remittitur.[8] If the Plaintiff fails to file, in writing, an acceptance of the remittitur by that time and date, the Defendants' motions for a new trial on the issue of damages alone will be granted.

IT IS SO ORDERED.

s/ David D. Dowd, Jr.
David D. Dowd, Jr.
U.S. District Judge

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8. The acceptance of the remittitur must be filed by the Plaintiff James Wilson. The signature of Wilson's counsel on behalf of Wilson will be deemed insufficient and the motion for a new trial will be granted absent the written acceptance by the Plaintiff James Wilson of the remittitur.